Supreme Court, U.S.
FILED
071294 APR 16 2008
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NO. 07-

IN THE
SUPREME COURT OF THE UNITED STATES

JULIO MALDONADO

Petitioner,

V.

DAVID YEINGST, et al.

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Did the lower federal Courts err in failing to address Petitioner's constitutional issues on the merits since Petitioner's untimely filing of his federal habeas corpus petition should have been offset by his presentation of evidence of actual innocence?

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Petitioner, Julio Maldonado, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Third Circuit entered in the above-captioned matter on January 7, 2008.

OPINIONS BELOW

The initial order of the Court of Appeals for the Third Circuit denying a Certificate of Appealability has not been officially reported. Moreover, neither the Order of the Honorable Jan E. DuBois of the Eastern District of Pennsylvania denying the Writ, as well as the Certificate of Appealability, nor the Report and Recommendation of United States Magistrate Judge Carol Sandra Moore Wells have been reported. These Orders and the Magistrate Judge's Report and Recommendation have been

reprinted at Appendices "A-C" respectively.

BASIS FOR JURISDICTION

A Petition for issuance of a Certificate of Appealability was denied by the Third Circuit Court of Appeals on January 7, 2008. Jurisdiction of this Court to review the denial of that Petition is invoked under 28 U.S.C.§1254(1). See also, Hohn v. United States, 524 U.S. 236 (1998).

STATUTORY PROVISIONS INVOLVED

28 U.S.C.§2244(d)(1) provides in pertinent part:

> "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a state court...."

CONCISE STATEMENT OF THE CASE

Petitioner, Julio Maldonado, and his co-defendant, Denis Calderon, were arrested and tried for attempted murder, aggravated assault, possession of an innocent of crime and related offenses in the Philadelphia Court of Common Pleas. This matter arose out of an ugly, racially motivated incident on August 4, 1996, where the defendants were attacked by 15-30 young, drunken, white youths, apparently because Mr. Calderon's family was the first Hispanic family, and indeed the first people of color, in their neighborhood. Most of the wrath of these out-of-control youths was directed at Mr. Calderon, who was stabbed with knives while also being beaten with fists and kicks. Many of the youths rained bottles down on both Maldonado and Calderon.

During the melee, Maldonado allegedly struck one of the youths, Christian Saladino, with "the club", causing a catastrophic brain injury from which he would never recover. Calderon allegedly struck Saladino in the abdomen with a bat which he retrieved from his house after escaping from the youths.

Remarkably, only Petitioner and Calderon were charged. They were tried in a bench trial before the Honorable Gregory E. Smith in the Philadelphia Court of Common Pleas. They were convicted of aggravated assault, possession of an instrument of crime, simple assault, recklessly endangering another person, terroristic threats and criminal

conspiracy. Both were sentenced to an aggregate sentence of 2-10 years.

The matter was timely appealed to the Pennsylvania Superior Court. On February 3, 1999, that Court found that there was sufficient evidence to convict on all charges. However, the Court remanded the matter to Judge Smith to hold an evidentiary hearing to determine whether trial counsel had been ineffective for failing to call Walter Hofman, M.D., a forensic Pathologist. See, No. 3674 PHL 1997, filed 2/3/99.

In the meantime, Mr. Saladino passed away, and the defendants were charged with murder. A jury trial was held before the Honorable Amanda

Cooperman in March and April, 2000 in the Philadelphia Court of Common Pleas, and both Maldonado and Calderon were found not guilty of those charges after Dr. Hofman testified that neither defendant could have struck Mr. Saladino. Patricia Ann Waters, who was also not called at the trial before Judge Smith, provided testimony that neither Calderon nor Maldonado struck Mr. Saladino.

At the remand hearing before Judge Smith, on April 10, 2000, Dr. Hofman testified that there had been no external or internal evidence of injury to Mr. Saladino. Indeed, the medical evidence from Mr. Saladino's two months' stay at Einstein Hospital in Philadelphia reflected that there was no evidence of

brain injury either from falling and striking his head or being hit on the head causing brain injury. There was also no evidence of trauma to his back, head, or abdomen. Indeed, no evidence of any blunt force injury was seen by several physicians over that two month period. Furthermore, there was no evidence of bleeding in the brain after a CT Scan was taken, and a CT Scan of the abdomen was also negative. N.T. 4/10/00, 9-13.

Dr. Hofman opined that if Mr. Saladino had been struck with a club or bat, as the prosecution witnesses contended, this would have left a mark on the internal or external portion of the brain causing a localized injury manifested by swelling, bleeding

and bruising. Indeed, there would have been some evidence of a mark after just two to four hours, let alone two (2) months. No break in the skin or bruise ever appeared leading Doctor Hofman to conclude there was no evidence of blunt force trauma.

Hence, Dr. Hofman opined that the coma was not caused as a result of a blow to the head or any other part of his body. Finally, Dr. Hofman opined that trauma in the nature of swelling, a mark, or a bruise would show up every time someone is hit with a bat or a club hard enough to knock them off their feet. Id. at 13-18, 24, 28-29, 38-41, 71.

After being sharply questioned by the Court, Dr. Hoffman opined that Mr. Saladino suffered a

spontaneous subarachnoid hemorrhage, which is similar to the hemorrhage that is seen when one has a stroke. He opined that the hemorrhage could have been caused by the consumption and abuse of drugs, as well as the alcohol level of .118 which was found in his system, and/or from a preexisting natural disease. The Doctor reached this conclusion because Mr. Saladino was apparently a young, healthy male, and there was no evidence of blunt force trauma nor any evidence of injury to the medulla oblongata. Id. at 23-41, 51-52.

After hearing this testimony, Judge Smith granted a new trial, finding trial Counsel ineffective for failing to investigate and call a medical expert at

trial. Nonetheless, the Superior Court of Pennsylvania in No. 1551 EDA 2000, held that the failure to present this evidence did not constitute ineffective assistance of counsel because the defendants were only convicted of "attempted assault."

Because of this finding, it is critical to set forth Judge Smith's findings of fact at the time of the entry of the guilty verdict:

> It seems to the Court form the angle at which Chris was hit, that Chris may possibly even been a peacemaker, that he indeed, his back was obviously turned or he was at a 45 degree angle obviously facing the racists or attackers or at some angle where he placed himself between the attackers and the defendant Maldonado before he was hit. Nevertheless, the Court believes that Mr. Maldonado and Mr. Calderon were again attacked and backed up to Mr. Calderon's house, that at that

time they had justification, at least Maldonado at the time had justification at using some self defense. The concern of this Court again is whether or not he used that amount of force against the correct people. I find that he did not , that he did not hit the people that were indeed attacking him .....

N.T. 5/13/97, 4-5 (emphasis added) Clearly, Judge Smith did not base his decision on the fact that there had merely been an attempted striking.

The Supreme Court of Pennsylvania denied Allowance of Appeal on November 25, 2003 in No. 380 EAL 2002.

On December 6, 2006, Petitioner filed his 2254 Petition in the Eastern District of Pennsylvania. The Petition requested that the Court issue a writ of habeas corpus granting a new trial. The Petition was admittedly filed beyond the AEDPA's one year

statute of limitations set forth in 28 U.S.C. §2244(d)(1). However, Petitioner contended that since the testimony of Dr. Hofman and Ms. Waters had demonstrated Petitioner's actual innocence, in the not guilty verdict rendered by the jury in the murder trial, a miscarriage of justice had occurred. In addition, it was further argued that since Judge Smith had found that trial Counsel had been ineffective in not investigating the medical issues through consultation with a forensic pathologist, the cause and prejudice standard had been met.

Accordingly, it was and is, respectfully submitted that these circumstances provided either an exception to the AEDPA's statute of limitations

and the District Court should have found that the statute of limitations was equitably tolled and address the merits of the Petition; and/or that the miscarriage of justice exception - Petitioner's showing of actual and absolute innocence - should have permitted Petitioner to avoid the time strictures of that statute and led to the hearing of the matter on the merits, as he should have been permitted to pass through the Habeas Corpus "gateway".

However, United States Magistrate Judge, Carol Sandra Moore Wells recommended that the writ be denied in her Report and Recommendation. See Appendix "C". That Court reasoned that since Petitioner had not provided any reason for failing to

file the Petition timely, the statute of limitations had been violated and the writ should be denied, principally citing Horning v. Lavan, 197 Fed. Appx. 90 (3d. Cir. 2006). See, App. "C" at 7-10. The Court did not address whether the actual innocence exception would permit the Court to address the merits, but only addressed the issue of whether that exception would toll the statute of limitations, finding that it did not.

The Honorable Jan E. DuBois adopted those findings without issuing an Opinion and did not issue a Certificate of Appealability. See, App "B". Timely appeal was taken to the Third Circuit Court of Appeals, and a Panel of that Court denied the

Petition for Certificate of Appealability in a decision filed on January 7, 2008. See, App. "A". The Order stated the following:

> "The foregoing request for a certificate of appealability is denied because the appellant has not made a 'substantial showing of the denial of a constitutional right.' 28 U.S.C.§2253(c)(2). On October 24, 2007, this Court denied an essentially identical request for a certificate of appealability filed by Appellant's co-defendant, Denis Calderon (C.A. No. 07-3097). Furthermore, reasonable jurists would agree, for substantially the reasons given by the District Court, that Appellant's petition was properly dismissed on statute-of-limitation grounds. See, e.g., Slack v. McDaniel, 529 U.S. 473, 484 (2000).

CONCISE STATEMENT OF REASONS FOR GRANTING THE WRIT[1]

MR. MALDONADO'S ACTUAL INNOCENCE OVERCOMES THE PROCEDURAL DEFAULT

While it is clear that the Petitioner did not file this Petition within one year of the exhaustion of state remedies, it is respectfully submitted that Mr. Maldonado's actual innocence should overcome the procedural default caused by his late filing. Indeed, several of this Court's decisions have held that evidence of actual innocence overcomes the type of procedural default, such as occurred in this case, and

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[1] While this is substantially the same Petition as filed by Calderon (No. 07-1211), it is respectfully urged that there are some subtle differences demanding that this Petition be read as closely.

permits the Petitioner to pass through the habeas corpus "gateway.". See, e.g. House v. Bell,126 S.Ct. 2064 (2006); Dretke v. Haley, 127 S.Ct. 1847 (2004); Bousley v. United States, 523 U.S. 612 (1998); Schlup v. Delo, 513 U.S. 298, 319 (1995); McCleskey v. Zant, 499 U.S. 467 (1991);and Murray v. Carrier, 477 U.S. 478 (1986).

Moreover, and most importantly, this is the only case that Petitioner's research has uncovered where the habeas corpus petitioner has actually demonstrated his actual innocence to a "hot record" trial Court, let alone two (2) such Courts, before the filing of the habeas petition. Indeed, in most instances, such as in the Schlup case, the petitioner

merely proffers evidence to a post conviction, not trial, Court and requests that the Court find that this evidence could probably establish actual innocence.

To obtain a Certificate of Appealability, a petitioner challenging a criminal conviction under §2254 must make a "substantial showing of the denial of a constitutional right." 28 U.S.C.§2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). This standard is satisfied by demonstrating that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484

(2000). When the District Court denies a petition on procedural grounds, as in this case, the standard is further refined, requiring petitioner to show that reasonable jurists could find it debatable whether (1) the petition states a valid claim of the denial of a constitutional right and (2) the District Court's procedural ruling was correct. Id.

Obviously, the Third Circuit found that reasonable jurists would not debate the District Court's dismissal.

Here, the testimony of Dr. Hofman has never been challenged on its scientific merits nor rebutted by the Commonwealth with an expert witness of its own in any of the proceedings in this case.

Indeed, neither side at the aggravated assault trial presented a medical forensic expert who could establish how Mr. Saladino had been injured as the Commonwealth relied solely on the eyewitness testimony of two young girls who had a view from hundreds of feet away and who testified that Mr. Saladino had been struck by Calderon and the Petitioner. Dr. Hofman's testimony clearly debunked that eyewitness testimony.

In Schlup v. Delo, this Court held that a petitioner may use a claim of actual innocence as a "gateway" or a means of excusing a procedural default and enable him or her to obtain review of constitutional challenges to their conviction. Id. at

315-17. That case set forth the following standard for determining the question of actual innocence:

> The [Murray v.] Carrier standard requires the habeas Appellant to show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." 477 U.S. at 496, 106 S.Ct. at 2649-2650. To establish the requisite probability, the Appellant must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. The Appellant thus is required to make a stronger showing than that needed to establish prejudice.

513 U.S. at 327-328.

It is respectfully submitted that through the testimony of Dr. Hofman and Patricia Waters, Mr. Maldonado has amply met this standard. Hence, it has already been conclusively proven that no

reasonable juror, having heard this new evidence, would have convicted Mr. Calderon in light of this new evidence, and a certificate of appealability should have been granted.

In addition, in Commonwealth v. Widmer, 560 Pa. 308, 744 A. 2d. 745, 751 (2000), the Pennsylvania Supreme Court noted that "[w]here the evidence offered to support the verdict is in contradiction to the physical facts, and in contravention to human experience and the laws of nature, then the evidence is insufficient as a matter of law." (Citation omitted). Dr. Hofman's testimony amply demonstrates that the testimony of the eyewitnesses who claim that they saw both Mr.

Maldonado and Mr. Calderon strike Mr. Saladino were clearly in error as their testimony was "in contradiction to the physical facts" and "in contravention to human experience and the laws of nature".

This Court also utilized the actual innocence doctrine in Bousley v. United States, 523 U.S. 612, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) to overcome a procedural default. There, the defendant had failed to appeal from his plea of carrying a firearm in violation of 18 U.S.C. §924(c)(1). Since the petitioner failed to challenge the validity of his plea on appeal, the Supreme Court held that he procedurally defaulted the claim regarding that plea. Id. at 621,

118 S.Ct. at 1610. Nonetheless, the Court instructed that this procedural default could be remedied, and his claims reviewed on the merits if Bousley could demonstrate that he was "actually innocent." Id. at 622, citing Murray v. Carrier, supra.

The miscarriage of justice exception to habeas review has also been authorized to be used when the state prisoner has procedurally defaulted his state remedies. See, e.g., House v. Bell, supra; Murray v. Carrier, supra.; and McClesky v. Zant, supra. There is no reason why the lower Courts should not have granted Mr. Calderon the same leeway when he procedurally defaulted his federal habeas remedy because of his late filing.

The Horning v. Lavan Court recognized that "Horning faces the procedural bar of the AEDPA statute of limitations." 197 Fed. Appx. at P.92. Nonetheless, and despite the fact that Horning received an illegal sentence, the Third Circuit was not willing to hear Horning's claim on the merits. Mr. Maldonado has been treated the same.

Given the above case law, it is further respectfully submitted that the Third Circuit has so far departed from the accepted and usual course of proceedings in addressing the miscarriage of justice exception. Given that this new scientific evidence, provided by Dr. Hofman, has amply demonstrated Mr. Calderon's innocence and has destroyed

confidence in the outcome of his trial, it is respectfully requested that this Court grant this cert petition, exercise its supervisory powers, and direct the lower Courts to permit Mr. Maldonado to pass through the habeas corpus gateway and have his constitutional claims addressed on the merits.

SPLIT IN THE CIRCUITS RE: EFFECT OF ACTUAL INNOCENCE CLAIMS ON TOLLING AEDPA'S STATUTE OF LIMITATIONS

This Court has "never squarely addressed the question [of] whether equitable tolling is applicable to AEDPA's statute of limitations." Pace v. Digugliemo, 544 U.S. 408, 418 n.8 (2005). Hence, the

Court has obviously not determined whether a showing of actual innocence would warrant equitable tolling of the limitations period and whether the showing of actual innocence in that context is the same as that necessary to avoid a procedural bar. This lack of direction has led to a significant split of authority amongst the Circuits.

Clearly, the Third Circuit in Horning v. Levan, supra has determined that the habeas petitioner must show that he or she exercised diligence in investigating and bringing claims before a District Court can even decide whether the actual innocence exception applies to toll the statute of limitations. 197 Fed. Appx. at 93.

Other Circuits also require such a showing of diligence. See, Flanders v. Graves, 299 F.3d 974, 978 (8th Cir. 2002) (even where evidence of actual innocence is demonstrated, "petitioner would have to show some action or inaction on the part of the respondent that prevented him from discovering the relevant facts in a timely fashion or..... that a reasonably diligent petitioner could not have discovered these facts in time to file a petition within the period of limitations."); Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998)(equitable tolling appropriate when habeas petitioner is actually innocent but would still have to demonstrate diligence in pursuing the federal habeas claims).

The Seventh Circuit has rejected this position holding that even if the habeas petitioner claims to be actually innocent, he or she must still meet the statutory requirement of timely action. See, Escamilla v. Jungwirth, 426 F.3d. 868, 872 (7th Cir. 2005).

The Second Circuit has taken a hybrid approach instructing the District Courts to first determine whether the Petitioner has presented a colorable claim of actual innocence before addressing the issue of whether such evidence would toll the statute of limitations; and also whether the claim was pursued with reasonable diligence and whether such diligence is necessary before the claim can be

addressed on the merits. See, Whitley v. Senkowski, 317 F.3d 223, 225-226 (2nd Cir. 2003).

The Eleventh Circuit has taken a similar approach, requiring the District Courts to determine whether the petitioner can make a showing of actual innocence before addressing the question of whether the Suspension Clause requires such an exception for actual innocence. See, Wyzykowski v. Dep't of Corrections, 226 F.3d 1213, 1218 (11th Cir. 2000).

The Ninth Circuit has also taken a middle ground position that is slightly different than those of the Second and Eleventh Circuits. In Majoy v. Roe, 296 F.3d 770 (9th Cir. 2002), the Court concluded that the petitioner might be able to demonstrate a

miscarriage of justice and remanded the matter to the District Court to determine whether a colorable claim of actual innocence had been presented and then determine what consequence such a finding has on tolling the statute of limitations. It hinted that if this showing could be made, the statute of limitations could be overridden. Moreover, the Court reached this conclusion even though the petitioner had not demonstrated diligence in uncovering newly discovered evidence pursuant to §2244(d)(1)(d). Id. at 776-778.

The Fifth and First Circuits have rejected equitable tolling entirely, even when a petitioner presents a colorable claim of actual innocence. In

Felder v. Johnson, 204 F.3d 168, 171 (5th Cir. 2000), cert. denied, 531 U.S. 1035 (2000), the Court noted that a claim of actual innocence would not constitute a "rare and exceptional" circumstance which would justify the equitable tolling of the limitations, "given that many prisoners maintain they are innocent." In David v. Hall, 318 F.3d 343, 347 (1st Cir. 2003), the Court held that the assertion of an actual innocence claim does not override the statute of limitations and would not toll same.

The Sixth Circuit has taken a vastly different approach than all the other Circuits. In Souter v. Jones, 395 F.3d 577 (6th Cir. 2005), the Court found that a colorable showing of actual innocence had

actually been presented in the District Court. It then conducted a searching inquiry of federal decisional law to determine whether a factually innocent petitioner should be granted equitable tolling. The Court concluded that equitable tolling was proper in these circumstances and directed the District Court to address the merits of Souter's claims even though there had been a procedural default. Moreover, the Court did not require evidence of diligence as a prerequisite to reaching the merits.

Several District Courts have also found that a showing of actual innocence tolls the statute of limitations although many have not. In Holloway v. Jones, 166 F.Supp.2d 1185 (E.D.Mi. 2001), the

District Court, principally citing District Court opinions, concluded that where a Petitioner can demonstrate that he or she is actually innocent, denying equitable tolling would violate either the Suspension Clause of the United States Constitution (Article 1, §9 CL.2) or the Eighth Amendment's ban on cruel and unusual punishment.

In Lisker v. Knowles, 463 F.Supp.2d 1008, 1038 (C.D.CAL. 2006), the Court adopted the Magistrate's Report and Recommendation which concluded that the statute of limitations must be tolled when proffered evidence demonstrates a colorable showing of actual innocence and that the dismissal of the habeas petition would comprise a

miscarriage of justice under Schlup.

Finally, in Garcia v. Portuondo, 344 F.Supp.2d 446 (S.D.N.Y. 2004), the Court held that the running of the AEDPA's statute of limitations is equitably tolled in the exceedingly rare case in which the petitioner makes out a credible claim of actual innocence, finding that that standard had been met in that case. See also, United States v. Zuno-Arce, 25 F.Supp.2d 1087, 1100 (C.D.CAL. 1998), affirmed, 245 F.3d 1108 (9th Cir. 2001)(the Court reasoned that to foreclose habeas review for a claim of actual innocence might violate either the Eight Amendment of the Suspension Clause, or comprise a due process violation).

It is clear from reviewing the above holdings that there is a great disparity in how the federal Courts approach the issue of actual innocence. Even though Mr. Maldonado has, at the very least, presented a colorable claim of actual innocence under Schlup, the Circuit Courts would address his situation far differently.

Some circuits would not even entertain this claim (the First and Fifth); some circuits would not entertain the claim because it was not brought with appropriate diligence (the Third, Eight, and Tenth); one would not address the claim because it was not brought within the statutory time limits (the Seventh); some might address the issue, but have not

provided clear direction on this issue because no case of actual innocence has ever been brought before their Courts (the Second, Ninth, and Eleventh); and only one, the Sixth Circuit, would appear to instruct that the District Court must address the matter on its merits.

In Lonchar v. Thomas, 517 U.S. 314, 324 (1996), this Court noted that:

> "Dismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty."

See also, O'Neal v. McAninch, 513 U.S. 432, 442 (1995)(describing the "basic purpose [ ] underlying the writ" as the correction of an error "that risks an

unreliable trial outcome and the consequent conviction of an innocent person.")

This Court has also observed that "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." Schlup at 513 U.S. at 325. Moreover, in In re Winship, 397 U.S. 352, 372 (1970), it was noted that it is far worse to convict an innocent man than to let a guilty man go free.

Given the principles espoused in previous cases by this Court (particularly in relation to the conviction of innocent individuals) about the Great Writ; the obvious disparity in the Circuits in tolling the statute of limitations where colorable claims of

actual innocence are presented; and the fact that these claims often arise in the habeas corpus context, it is respectfully requested that this Honorable Court accept supervision of this issue and grant the Writ of Certiorari to determine whether there should be equitable tolling when an individual makes a showing of actual innocence under the Schlup standard.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant review of the important issues presented in this matter.

Respectfully submitted

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ALD-84 December 20, 2007

APPENDIX "A"
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. 07-3802

JULIO MALDONADO
VS.
DAVID YEINGST, ET AL.
(E.D. Pa. Civ. No. 06-cv-05353)

Present: SLOVITER, FISHER and
HARDIMAN, Circuit Judges

Submitted are:
(1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1); and
(2) Appellees' response in the above-captioned case.

Respectfully, Clerk

MMW/MPD/je/arl

ORDER

The foregoing request for a certificate of appealability is denied because Appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). On

October 24, 2007, this Court denied an essentially identical request for a certificate of appealability filed by Appellant's co-defendant, Denis Calderon (C.A. No. 07-3097). Furthermore, reasonable jurists would agree, for substantially the reasons given by the District Court, that Appellant's petition was properly dismissed on statute-of-limitations grounds. See, e.g., Slack v. McDaniel, 529 U.S. 473, 484 (2000).

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: January 7, 2008
ARL/cc: JMB; JSG

APPENDIX "B"
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

JULIO MALDONADO
Petitioner,

v CIVIL ACTION NO. 06-5353

DAVID YEINGST, WARDEN,
PERRY COUNTY PRISON;
DISTRICT ATTORNEY FOR PHILADELPHIA
COUNTY; THE ATTORNEY GENERAL OF THE
STATE OF PENNSYLVANIA
Respondents.

ORDER

AND NOW, this 23rd day of August, 2007, upon careful and independent consideration of the Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254, and after review of the Report and Recommendation of United States Magistrate Judge Carol Sandra Moore Wells dated June 21, 2007, the objections to Report and Recommendation of Magistrate Judge, and petitioner's letter of July , 2007 which set forth an additional objection,' IT IS ORDERED as follows:

1. The Report and Recommendation of United States Magistrate Judge Carol Sandra Moore Wells sated June 21., 2007, is APPROVED and ADOPTED;

2. Petitioners Objections to Report and Recommendation of Magistrate Judge and additional

objection set forth in counsel's letter of July 9, 2007, are OVERRULED for the reasons set forth in the Report and Recommendation;

3. Th Petition for Writ of Habeas Corpus filed by Julio Maldonado pursuant to 28 US.C. § 2254 is DISMISSED as time-barred; and,

4. A Certificate of appealability will, not issue on the ground that petitioner has not made a substantial showing of a denial of a constitutional right as required under 28 U.S.C. § 2253(c)(2).

BY THE COURT:

/s/ Honorable Jan E DuBois
JAN E. DUBOIS, J.

APPENDIX "C"
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

JULIO MALDONADO,
CIVIL ACTION Petitioner

v. NO. 06-5353

DAVID YEINGST, et al.,
Respondent

June 21, 2007

REPORT AND RECOMMENDATION
CAROL SANDRA MOORE WELLS
UNITED STATES MAGISTRATE JUDGE

Presently before the court is a Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254. Julio Maldonado ("Petitioner"), currently incarcerated at the Perry County Prison in New Bloomfield, Pennsylvania, seeks habeas relief based on claims of ineffective assistance of counsel, suspension of the writ of habeas corpus, and newly discovered evidence that demonstrates his actual innocence. The Honorable Jan E. Dubois referred this matter to the undersigned for preparation of a Report and Recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B). For the reasons set forth below, it is recommended that Petitioner's time-barred habeas claims be DISMISSED on procedural grounds without an evidentiary hearing.

I. FACTUAL AND PROCEDURAL HISTORY[1]

The Pennsylvania Superior Court summarized the facts leading to Petitioner's conviction as follows:

. . . during the early morning hours of August 4, 1996. [Petitioner],a New York resident, was visiting his cousin Dennis Calderon, who resides at 1147 Rosalie Street in Philadelphia. [Petitioner] and Calderon, are both Hispanic. At approximately 12:30 a.m., [Petitioner] and Calderon decided to get a beer at the local bar down the street. On their way to the bar, they encountered a group of young white males who were drinking beer on the corner. As [Petitioner] and Calderon approached them, there was a racial confrontation. Conflicting testimony was presented at trial regarding what [Petitioner] and Calderon said in response. As a result of the comments, however, [Petitioner] and Calderon became involved in a physical altercation with several members of the group.

During the course of the altercation, [Petitioner] and Calderon retreated in the direction of Calderon's house pursued by several of the young white males. When a few of the males grabbed Calderon,

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[1] The facts set forth in this background and procedural history were gleaned from Petitioner's Habeas Corpus Petition, Petitioner's Memorandum of Law, the Commonwealth's response, inclusive of all exhibits thereto, Petitioner's Reply Memorandum, and the state court record

[Petitioner] ran to his car and returned with an automobile anti-theft device commonly known as "The Club." [Petitioner] swung "The Club" in the direction of those surrounding his cousin. Several witnesses at trial testified that, while swinging the device, [Petitioner] struck the victim, Christian Saladino, an uninvolved bystander, in the back of the head. Further testimony provided that the victim fell to the ground unconscious immediately after being hit.

Shortly thereafter, Calderon became free of his attackers and retreated to his house. He returned with an aluminum baseball bat and stood over the victim's body. Calderon threatened to "crack" the victim if the white males did not stay back. At trial, a witness testified that [Petitioner] and Calderon used the weapons to pursue the remaining white males up the street.

At approximately 1:00 a.m., the police and paramedics arrived on the scene in response to a 911 call. The paramedics found the victim with no pulse or respiratory activity. After initiating emergency procedures, the paramedics were able to stimulate respiratory and heart activity. The victim was then transported to Einstein Hospital, where he was diagnosed as having sustained an injury to the medulla oblongata, a portion of the brain stem used to regulate one's heartbeat and respiration. As a result of the injury, the victim suffered massive brain damage and currently exists in a near vegetative state. The cause of the victim's injuries remains in contention, however, because hospital physicians found no evidence of external trauma to the victim's

head.

At the scene of the incident, several witnesses informed police that [Petitioner] and Calderon were responsible for the victim's injuries. Although [Petitioner] told police that he and his cousin were merely defending themselves, [Petitioner] and Calderon were arrested and charged with aggravated assault, simple assault, possession of an instrument of crime, recklessly endangering another person and criminal conspiracy. After waiving their right to a jury trial, [Petitioner] and Calderon were tried together as co-defendants at a bench trial before Judge Smith. [Petitioner] and Calderon were convicted on all charges and each was subsequently sentenced to 21/2 to 10 years imprisonment.

Commonwealth v. Maldonado, No. 3732 Philadelphia 1997, slip. op. at 1-4 (Pa. Super. Ct. Feb. 3, 1999) (footnotes omitted) ("Super. Ct. PCRA Op."). The victim later died and Petitioner and Calderon were charged with his murder but were acquitted by a jury. Response ("Resp.") at 3.

On direct appeal, the Pennsylvania Superior Court affirmed Petitioner's conviction and sentence but remanded the case for an evidentiary hearing on whether trial counsel were ineffective for failing to retain and call an expert medical witness to opine regarding the possible causes of the victim's injuries. Id. at 2. The Pennsylvania Supreme Court declined review. Commonwealth v. Maldonado, 742 A.2d 673 (Pa. 1999). The trial court, finding that counsel were ineffective, ordered a new trial for both Petitioner and Calderon. Resp. at 5. The Commonwealth

appealed the trial court's decision. Id. On July 11, 2002, the Superior Court reversed the trial court's decision and reinstated the judgments of sentence. Commonwealth v. Maldonado, No. 1723, E.D.A. 2000 (Pa. Super. Ct. July 11, 2002). Petitioner did not timely seek allowance of appeal in the Pennsylvania Supreme Court. Resp. at 5-6. Petitioner's co-defendant, Calderon, filed a petition for allowance of appeal in the Pennsylvania Supreme Court, which was denied on November 25, 2003. Petition for Writ of Habeas Corpus ("Pet.") at 9b. While Calderon's petition was pending, Petitioner sought leave to join it, but was denied relief on February 10, 2004. Id. Petitioner sought neither certiorari to the United States Supreme Court nor relief under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. § 9541 et seq. Resp. at 6.

On December 6, 2006, Petitioner filed this counseled petition for federal habeas corpus relief claiming:
Ground One - Trial Counsel was ineffective for failing to investigate and call a witness at trial and/or the potential testimony of these witnesses constituted newly discovered evidence. Either ground requires the grant of a new trial. Also succeeding Counsel were ineffective for failing to raise this ground in post-conviction proceedings;
Ground Two - Trial Counsel was ineffective for failing to call forensic pathologist, Walter Hoffman, M.D.,to the stand;
Ground Three - The Evidence was insufficient as to any of the charges in this case and no rational trier of fact would have found these defendants guilty. In fact, when they were tried by a jury, the[y] were acquitted;

Ground Four - The ADEPA violates the suspension clause; and
Ground Five - The newly discovered evidence of both Dr. Hoffman and Ms. Waters demonstrated Petitioner's actual innocence.

Pet. at 4. The Commonwealth contends that Petitioner's claims should be dismissed as untimely. Resp. at 10-29. This court agrees.

II. DISCUSSION

A. The AEDPA Period of Limitations

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") was enacted; it imposes a one year period of limitations ("AEDPA year") for filing habeas corpus petitions. See 28 U.S.C. § 2254 (d)(1). The AEDPA time period begins to run on the latest of the following:

(A) the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims could have been discovered through

the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(A)-(D). The Third Circuit has held that the starting date for the habeas period of limitations must be determined separately for each cognizable claim contained in the petition. See Fiedler v. Varner, 379 F.3d 113, 117-18 (3d Cir. 2004).

The usual starting date for the habeas period of limitations, as provided by 28 U.S.C. § 2244(d)(1)(A), is the date a conviction becomes final on direct appeal. See Fiedler, 379 F.3d at 116. Based on the procedural history summarized earlier, Petitioner's conviction became final on or about August 10, 2002, the date his ability to timely seek review in the Pennsylvania Supreme Court expired. See Swartz v. Meyers, 204 F.3d 417, 419 (3d Cir. 1999); Pa. R. App. P. 1113(a). Petitioner does not argue that any of his claims implicate alternative starting dates in 28 U.S.C. § 2244(d)(1), hence, his AEDPA year commenced for all of his claims on August 10, 2002. Petitioner had one year, or until August 10, 2003, to seek federal habeas relief. The present federal habeas petition was not filed until December 6, 2006, more than three (3) years after the expiration of Petitioner's AEDPA deadline. Therefore, the instant petition is untimely and, unless a tolling exception applies, time-barred.

B. Statutory Tolling

If, prior to the expiration of his full AEDPA year, Petitioner timely sought collateral review, "[t]he time during which [that] properly filed application for state post-conviction or other collateral review with

respect to the pertinent judgment or claim [was] pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2); see generally Artuz v. Bennett, 531 U.S. 4, 9 (2000). Since Petitioner never sought state collateral relief, statutory tolling cannot apply. Therefore, unless Petitioner qualifies for equitable tolling, his habeas petition must be dismissed as time-barred.

C. Equitable Tolling

The Third Circuit has held that the one-year period of limitations contained in § 2244(d)(1) does not impose a jurisdictional bar. See Miller v. N.J. State Dep 't of Corr., 145 F.3d 616, 617-18 (3d Cir. 1998). Thus, district courts may equitably toll the one-year period of limitations when the "principles of equity would make [the] rigid application [of a limitation period] unfair." Id. at 617. This doctrine will be sparingly invoked, Seitzinger v. Reading Hosp. & Med. Ctr., 165 F.3d 236, 239 (3d. Cir. 1999), 'only in the rare situation where [it] is demanded by sound legal principles as well as the interests of justice.'" LaCava v. Kyler, 398 F.3d 271, 275 (3d Cir. 2005) (quoting United States v. Midgley, 142 F.3d 174, 179 (3d Cir. 1998)). To merit equitable tolling, Petitioner must establish two general requirements:

(1) that "the petitioner has in some way been prevented from asserting his rights [due to extraordinary circumstances];" and (2) that the petitioner has shown that "he or she exercised reasonable diligence in investigating and bringing the claims."

Merritt v. Blaine, 326 F.3d 157, 168 (3d Cir. 2003) (quoting Fahy v. Horn, 240 F.3d 239, 244 (3d

In as much as Petitioner is not a capital defendant, he must satisfy both of these mandates. See Merritt, 326 F.3d at 168-70.

Petitioner argues that he is entitled to equitable tolling because his counsel were ineffective in failing to call Dr. Walter Hofman, a medical expert, and Patricia Waters, an eyewitness, to testify at trial and that this failure constitutes "cause and prejudice" for his "procedural default." Memorandum of Law in Support of Habeas Corpus Petition Under 28 U.S.C. § 2254 ("Pet. Mem.") at 13-22. He also claims entitlement to equitable tolling because he is actually and factually innocent. Id. at 23-36.

Petitioner is not entitled to equitable tolling as set forth in Merritt. First, he has not adduced any proof that the respondents actively misled him, or, in any extraordinary way, prevented him from asserting his rights in a timely manner. Second, Petitioner's claim of actual and factual innocence does not entitle him to equitable tolling. The Third Circuit has yet to decide whether it will allow actual innocence to equitably toll the habeas period of limitations[2]. See

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Several circuits have allowed actual innocence to equitably toll the habeas period of limitations. See Souter v. Jones, 395 F.3d 577, 602 (6th Cir. 2005); Gildon v. Bowen, 384 F.3d 883, 887 (7th Cir. 2004); Flanders v. Graves, 299 F.3d 974, 978 (8th Cir. 2002); Gibson v. Klingler, 232 F.3d 799, 808 (10th Cir. 2000); but see David v. Hall, 318 F.3d 343, 347 (1st Cir. 2003) (holding that actual innocence does not justify equitably tolling the habeas period of

LaCava, 398 F.3d at 274 n.3 (declining to address whether LaCava's actual innocence claim could overcome an AEDPA time bar); Scott v. Lavan, 190 Fed. Appx. 196, 199 (3d Cir. 2006) (non-precedential decision) (declining to address this question because Scott could not demonstrate that he was actually innocent).

However, in a case similar to this one, the Third Circuit held that "even assuming that this court were to permit equitable tolling of the AEDPA statute of limitations when a viable claim of actual innocence has been presented, Horning's claim would nevertheless fail because he did not exercise reasonable diligence in pursuing his actual innocence claim." Horning v. Lavan, 197 Fed.Appx. 90, 94 (3d Cir. 2006) (non-precedential decision) (emphasis added). Like Horning, Petitioner has not demonstrated that he exercised "reasonable diligence" in investigating and pursuing his federal claim, because he waited over three years beyond the statutory deadline of August 10, 2003 to file this counseled habeas corpus petition. Petitioner relies upon the March and April 2000 testimony of Dr. Hoffman and Patricia Waters to establish his claim of actual innocence. Pet. Mem. 14-21. Clearly then, Petitioner knew of this testimony in 2000, two years prior to the date his conviction became final, and had he exercised reasonable diligence he could have preserved his claim of actual innocence. The record,

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limitations). The Third Circuit has not adopted this exception.

thus, is devoid of factual justification for equitable tolling. Nor has Petitioner convinced this court that "rigid application of the statute would be unfair." Fahy, 240 F.3d at 245. Accordingly, equitable tolling is denied and Petitioner's habeas petition, filed on December 6, 2006, should be dismissed as time-barred.

E. Suspension Clause and 28 U.S.C. § 2241

Petitioner attempts to avoid the dismissal of his habeas petition on timeliness grounds by arguing that the AEDPA statute of limitations operates to suspend his right to habeas corpus in violation of Article 1, Section 9, Clause 2 of the federal constitution ("the Suspension Clause").

Alternatively, he argues that he should be allowed to proceed under 28 U.S.C. § 2241.

The United States Supreme Court and the Third Circuit have yet to determine explicitly whether or not the habeas period of limitations constitutes a per se violation of the Suspension Clause. However, this question has been addressed by several circuit courts of appeal; they all have held that it does not. See Delaney v. Matesanz, 264 F.3d 7, 12 (1st Cir. 2001); Wyzykowski v. Dep't of Corrs., 226 F.3d 1213, 1217-18 (11th Cir. 2000); Lucidore v. New York State Div. ofParole, 209 F.3d 107, 113 (2d Cir. 2000); Turner v. Johnson, 177 F.3d 390, 392-93 (5th Cir. 1999); Miller v.

Marr, 141 F.3d 976, 977-78 (10th Cir. 1998). Petitioner makes no credible argument that application of the habeas period of limitations to bar

relief will violate the Suspension Clause[3].
The Third Circuit has considered whether an inmate might be allowed to seek habeas relief under 28 U.S.C. § 2241 if he could not seek such relief under 28 U.S.C. § 2255 because he was barred by an AEDPA gatekeeping requirement[4]. In re Dorsainvil,

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3 Petitioner argues that, even before considering whether he can demonstrate a fundamental miscarriage of justice to excuse his untimely petition, the court should consider whether cause and prejudice exists to allow consideration of his untimely petition. See Reply Mem. at 2 (citing Dretke v. Haley, 541 U.S. 386 (2004)). The court notes that there is no authority to support the contention that cause and prejudice, which are exceptions to the procedural default and abuse of the writ doctrines, see Dretke, 541 U.S. at 393, McCleskey v. Zant, 499 U.S. 467 494 (1991), should be extended to excuse untimely habeas petitions. Dretke, which Petitioner cites, does not support such a contention because it concerned a procedurally defaulted claim, not an untimely claim. See Dretke, 541 U.S. at 391. In the absence of any authority to support Petitioner's argument, the court declines to extend the cause and prejudice exception to untimely habeas petitions.

4 Specifically, Dorsainvil filed a second § 2255 motion in September 1996 in which he sought relief pursuant to the decision in Bailey v. United States, 516 U.S. 137 (1995). In re Dorsainvil, 119 F .3d 245, 246 (3d Cir. 1997). The Third Circuit concluded that it could not authorize Dorsainvil's second § 2255 motion because he could not satisfy the AEDPA-imposed requirements for second § 2255 motions. Id. at 247-48.

119 F.3d 245 (3d Cir. 1997). In Dorsainvil, the Third Circuit held that § 2255 provided an inadequate and ineffective remedy and, therefore, allowed Petitioner to proceed under §2241. Id. at 251. Notably, Dorsainvil maintained that the United States Supreme Court had construed the requirements of the statute he was convicted of violating, 18 U.S.C. § 924(c)(1), in a manner that indicated his conduct was not criminal. Id. at 250-51. The court emphasized the uniqueness of Dorsainvil's claim inasmuch as the Supreme Court's decision issued between the time he filed his first and second § 2255 motions. Id. at 251.

Petitioner in this case offers no extraordinary claim similar to that of Dorsainvil. That is, he does not claim that a decision of the Supreme Court confirms that his conduct was not criminal. Therefore, Dorsainvil does not justify allowing Petitioner to proceed under § 2241.

III. CONCLUSION

All of Petitioner's claims are time-barred. Further, he has not satisfactorily explained his dilatory behavior and, thus, is ineligible for either statutory or equitable tolling of the AEDPA one year limitations period. Therefore, federal habeas review is precluded. Furthermore, reasonable jurists would not debate the appropriateness of this court's procedural disposition of these claims. Thus, a certificate of appealability should not issue. See Slack v. McDaniel, 529 U.S. 473, 484 (2000).
Accordingly, I make the following:

RECOMMENDATION

AND NOW, this 21" day of June, 2007, for the reasons contained in the preceding report, it is hereby RECOMMENDED that petitioner's time-barred claims be DISMISSED, without an evidentiary hearing. Petitioner has neither met statutory requirements nor shown equitable reasons to overcome AEDPA' s time bar and to entitle him to a decision on the merits. Moreover, Petitioner has not established that any reasonable jurist could find this procedural ruling flawed. Therefore, a certificate of appealability should not be issued.

It be so ORDERED.

/s/ Carol Sandra Moore Wells
CAROL SANDRA MOORE WELLS UNITED STATES MAGISTRATE JUDGE